

RESEARCH AND DEVELOPMENT JOINT VENTURE ACT
OF 1983

NOVEMBER 18, 1983.—Ordered to be printed

Mr. FUQUA, from the Committee on Science and Technology, submitted
the following

REPORT

[To accompany H.R. 4043 which, on September 30, 1983, was referred jointly to
the Committee on the Judiciary and the Committee on Science and Technology]

[Including cost estimate of the Congressional Budget Office]

The Committee on Science and Technology, to whom was referred
the bill (H.R. 4043) to modify the operation of Federal and State
antitrust laws with respect to certain joint research and development
activities, and for other purposes, having considered the same, report
favorably thereon with an amendment and recommend that the bill
as amended do pass.

CONTENTS

	Page
1. Amendment	2
2. Purpose of the bill, as amended	7
3. Committee actions	7
4. Background and need for legislation	8
5. Explanation of the bill, as amended	13
A. Summary of the key provisions of the committee amendment ..	13
B. Detailed explanation of the committee amendment	15
1. Research and development definition	15
2. Application of antitrust laws	16
I. Defined standards (Safe Harbor)	16
II. Disclosure to Attorney General (negative clear- ance)	19
3. Investigation by the Attorney General	20
4. Attempts to form R&D joint ventures	20
5. Claims under antitrust laws	21
6. Modification of the "Per Se" rule	21
7. Modification of damages	21
8. Attorney's fees	21
9. Severability	22
6. Sectional analysis	22
7. Committee views	26

CONTENTS—Continued

	Page
8. Inflation impact.....	27
9. Committee oversight findings and recommendations.....	27
10. Summary of Government Operations Committee findings and recommendations.....	27
11. Budget analysis and projection.....	27
12. Congressional Budget Office estimate and comparison.....	27
13. Administration position.....	28
14. Committee recommendations.....	28

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SHORT TITLE

SECTION 1. This Act may be cited as the "Research and Development Joint Venture Act of 1983".

FINDINGS AND PURPOSES

SEC. 2. (a) The Congress finds the following:

(1) Research and development are major factors in the growth and productivity of United States industry and of the national industry.

(2) Although innovations in some industries have resulted in impressive increases in productivity, the overall rate of growth in industrial productivity in the United States is decreasing.

(3) Growth in industrial productivity requires the strong support of basic research and development, and the introduction of advanced concepts and processes into industries.

(4) Many firms are unable to undertake the levels of research and development necessary for the United States to remain competitive in global markets because of the capital intensive nature of research and development projects and the chronic shortage of trained scientific and engineering personnel.

(5) The need for United States firms to share risks has been greatly magnified by reason of activities by foreign governments in selecting, subsidizing, sponsoring cooperation of industry members, or otherwise coordinating industrial research and development projects to enhance the positions of foreign firms in the United States and global markets.

(6) There are genuine procompetitive benefits of joint research and development activities in that new knowledge, information, base technologies, and products are brought forward.

(7) The uncertainty of interpretation and enforcement of Federal and State antitrust laws discourages joint research and development activities, often when joint activity would foster innovation and enhance competition.

(8) There is a need to modify the application of Federal and State antitrust laws in order to encourage commercial entities to carry out productive joint research and development projects.

(b) The purpose of this Act is to modify the operation of Federal and State antitrust laws with respect to conducting research and development activities jointly and thereby encourage commercial entities to secure the benefits of such activities in order to increase industrial innovation, productivity, and the economic competitiveness of the United States.

APPLICATION OF ANTITRUST LAWS

SEC. 3. (a) No person shall be liable under the antitrust laws, or under any State law similar to the antitrust laws, for making or performing a contract of the type specified in subsection (b) to which such person is a party, if such person gives notice to the Attorney General in accordance with section 4.

(b) For purposes of subsection (a), a contract shall—

(1) provide that—

(A) the parties to such contract shall carry out jointly one or more research and development projects,

(B) within a reasonable time after information is discovered or developed as a result of carrying out a specific research and development project under such contract, the parties to such contract who participate

in carrying out such project shall report such information to each party to such contract,

(C) all parties to such contract who participate in carrying out a specific research and development project shall be entitled to use, on an equitable basis, the results of such projects, and

(D) all parties to such contract who participate in carrying out a specific research and development project at the time information is discovered or developed by such project shall be entitled to irrevocable, nonexclusive, equivalent licenses to exercise all rights acquired with respect to such information under the laws relating to patents and copyright,

(2) not impose on any party to such contract—

(A) any restriction with respect to any research and development project which may be carried out by such party, other than a research and development project to be carried out under such contract,

(B) any obligation to make available to any other person the results of any research and development project carried out by such party, except as necessary to carry out a research and development project under such contract,

(C) any restriction or requirement, other than a restriction or requirement permitted under this section, on the exercise of any right such party may have to use any invention, information, or product resulting from a research and development project carried out under such contract, or

(D) any restriction or requirement with respect to the manufacturing or marketing of any product or service unrelated to or resulting from any research and development project carried out under such contract, and

(3) not violate any limitation specified in subsection (c).

(C) For purposes of subsection (b) (3)—

(1) a contract referred to in such subsection, and any other agreement relating to such contract, may not provide that any of the parties shall carry out jointly or severally any activity other than—

(A) a research and development project,

(B) any activity necessary to carry out the contract terms specified in subsection (b) and the requirements of this subsection, and

(C) any activity necessary to obtain a patent or issue a license applicable to information resulting from a research and development project carried out under such contract,

(2) with respect to each research and development project to be or being carried out under such contract, there are not fewer than two persons or groups of persons (other than such parties and any person owned or controlled by any of such parties) each of whom is capable of being engaged in the line of commerce to which such project relates and whose separate financial resources or aggregate financial resources, respectively, are not less than the aggregate financial resources, as of the time such contract is made and as of any time such contract is amended to add a party, of the parties participating in such project at any time, and

(3) the parties to such contract shall submit to the Attorney General information in accordance with section 4.

NOTIFICATION OF ATTORNEY GENERAL

SEC. 4. (a) Not later than sixty days after making a contract or after amending a contract in such manner that the information submitted in the preceding notification is no longer accurate, as the case may be, or sixty days after the date of the enactment of this Act in the case of a contract in effect on such date of enactment, with respect to which any benefit under section 3(a) is or may be claimed, the parties to such contract shall submit in writing to the Attorney General, in such form as the Attorney General may require—

(1) notice of the date that such contract is made, and of the date of any amendment to such contract,

(2) the name of each of the parties to such contract,

(3) a general description of each research and development project to be carried out under such contract,

(4) with respect to each such research and development project, the name of each party who will participate in carrying out such project, and

(5) a statement to the effect that such contract satisfies the requirements specified in section 3.

(b) Not later than thirty days after any notification is given under subsection (a), the Attorney General shall publish in the Federal Register information regarding the contract or amendment involved, identification of the parties and of the general nature of each research and development project to be carried out under such contract.

CLEARANCE PROCEDURE

SEC. 5. (a) No person shall be liable under the antitrust laws, or under any State law similar to the antitrust laws, for any penalty or relief, other than injunctive relief or the issuance of a license under subsection (e) (2), for performing a contract to carry out a research and development project jointly with another if—

(1) such contract—

(A) contains the provisions specified in subparagraphs (B) and (C) of section 3(b) (1), and

(B) does not impose on any party to such contract any restriction, obligation, or requirement specified in section 3(b) (2),

(2) such person complies with subsections (b) and (d), and

(3) such performance occurs—

(A) more than ninety days after initial compliance with subsection (b), or

(B) more than sixty days after the Attorney General publishes notice of such initial disclosure in accordance with subsection (c).

(b) For purposes of subsection (a), a person shall—

(1) disclose to the Attorney General—

(A) the nature, scope, and duration of each project to be carried out under the contract involved, and

(B) the identities of the parties to such contract participating in such project, and

(2) provide to the Attorney General—

(A) any information or document expressing the content of such contract, and

(B) any other information relating to the impact of such contract on competition that the Attorney General requires by rules in effect at the time such person initially complies with the other provisions of this subsection.

(c) Not later than thirty days after a person initially complies with subsection (b), the Attorney General shall publish in the Federal Register notice of such initial compliance. Such notice shall—

(1) identify the parties to the contract involved,

(2) describe in general terms each research and development project to be carried out under such contract, and

(3) specify the extent to which information and documents submitted under subsection (b) are available to the public.

Not later than thirty days after a person complies with subsection (b) as a result of amending a contract, the Attorney General shall publish in the Federal Register notice of such continuing compliance. Such notice shall include the date such amendment is made and any matters specified in paragraphs (1) through (3) affected by such amendment.

(d) For purposes of subsection (a), a person shall provide to the Attorney General, on the request of the Attorney General, any information relating to the contract involved if such information is of the type required, as of the time of such request, to be provided under subsection (b) (2) (B) by a person to initially comply with subsection (b).

(e) (1) Subsection (a) shall not apply to conduct which occurs after the date temporary or permanent injunctive relief is granted for a violation of the antitrust laws, or of any State law similar to the antitrust laws, if such conduct is of the same kind as the conduct with respect to which permanent injunctive relief is so granted.

(2) In an action under the antitrust laws, or any State law similar to the antitrust laws, against a person who alleges that subsection (a) applies with respect to the claim involved, the claimant may request, in lieu of injunctive relief, an order requiring the issuance of a license under this paragraph. If

the claimant prevails, the court shall order such person to issue to such claimant a license to the rights acquired by such person under the laws relating to patents and copyright if such rights are based on the research and development project with respect to which such person violated the antitrust laws. For purposes of determining the terms and conditions of a license required to be issued under this paragraph, the court shall take into consideration the extent of the injury to the claimant caused by such violation.

(f) (1) Except as provided in section 552(b) of title 5, United States Code, and except as provided in paragraph (2), any information or document submitted under subsection (b) or (d) to the Attorney General shall be available to the public upon request after the expiration of the thirty-day period beginning on the date so submitted.

(2) Any person who submits information or any document under subsection (b) or (d) may request that such information or document not be made available to the public, notwithstanding section 552 of title 5, United States Code. Such request shall specify precisely which information or document should not be made available to the public and the minimum period of time during which such person considers it necessary that such information or document not be made available to the public, and shall justify such request both as to substance and time. If the Attorney General determines that there is good cause to withhold such information or document from the public, such information or document shall be exempt from disclosure under section 552(a) of title 5, United States Code, for the time period involved.

INVESTIGATION BY ATTORNEY GENERAL

SEC. 6. (a) The Attorney General may investigate persons who are required to submit information under section 4 or section 5, for the purpose of determining whether—

(1) in the case of information required to be submitted under section 4—

(A) such information is submitted and is accurate when submitted,

(B) the contract with respect to which such information is submitted complies with section 3, and

(C) the research and development projects carried out under such contract comply with the terms of such contract and are consistent with the descriptions of such projects provided to the Attorney General under section 4, and

(2) in the case of information and documents required to be submitted under section 5—

(A) such persons have omitted or misrepresented material facts, and

(B) the research and development projects carried out under the contract with respect to which such information and documents are submitted comply with the terms of such contract and are consistent with the descriptions provided to the Attorney General under section 5(b) (1).

(b) Whenever the Attorney General commences an investigation under subsection (a) (1), the Attorney General shall notify the person who is the subject of such investigation that such investigation is in progress. If the Attorney General determines with respect to the contract involved in the investigation that such contract, or the contract as amended, does not comply with section 3, then the Attorney General shall give written notice of such determination to the parties to such contract. Such notice shall include—

(1) a statement of the facts and reasons in support of such determination, and

(2) a statement specifying any actions that such parties may take to modify such contract to comply with section 3.

If the Attorney General determines that such contract does not comply with section 3 because such contract violates the prohibition specified in section 3(c) (2), such contract shall be deemed to comply with section 3(c) (2) if the parties amend such contract to agree to issue licenses, to such persons and on such terms and conditions as the Attorney General determines to be fair and reasonable to rights which are acquired by such parties under the laws relating to patents and copyright and which are based on research and development projects carried out under such contract.

(c) Information obtained by the Attorney General in the course of conducting any investigation under subsection (a) is exempt from disclosure under section 552 of title 5, United States Code.

(d) No determination made by the Attorney General under subsection (a) is admissible as evidence in any administrative or judicial proceeding based on a claim arising under the antitrust laws.

ATTEMPTS TO MAKE CONTRACTS

SEC. 7. No person shall be liable under the antitrust laws, or under any State law similar to the antitrust laws, for attempting to make a contract to carry out a research and development program jointly with another person.

CLAIMS UNDER ANTITRUST LAWS

SEC. 8. (a) In the case of any claim under the antitrust laws, or under any State law similar to the antitrust laws, against a person, the failure of such person to satisfy the requirements established in section 3 or section 5 shall not be considered to be evidence that a violation of any of the antitrust laws, or such State law, has been committed by such person.

(b) In any action under the antitrust laws, or under any State law similar to the antitrust laws, arising out of any person's making or performing a contract to carry out a research and development project jointly with another person, judgment shall be entered for the defendant unless the plaintiff (1) establishes that the conduct in question has failed to satisfy the applicable provisions of section 3, and (2) establishes a cause of action against the defendant under the antitrust laws, or where appropriate, under any State law similar to the antitrust laws.

PER SE VIOLATION OF ANTITRUST LAWS

SEC. 9. In any action under the antitrust laws or under any State law similar to the antitrust laws, making or performing a contract to carry out a research and development project jointly with another person shall not be deemed per se to be a violation of any such law.

MODIFICATION OF DAMAGES

SEC. 10. No person shall be liable under the antitrust laws, or under any State law similar to the antitrust laws, for an amount in excess of the actual damages sustained by the claimant by reason of the violation of any such laws, the cost of suit (including a reasonable attorney's fee), and any interest awarded (from the date of service of the pleading setting forth the claim) with respect to such damages if such liability results from making or performing a contract to carry out a research and development project jointly with another person.

ATTORNEY'S FEES

SEC. 11. In any action which is brought under the antitrust laws and which includes a claim that results from attempting to make, making, or performing a contract to carry out a research and development project jointly with another person, the court shall award to the person against whom such claim is made a reasonable attorney's fee attributable to such claim if the claimant fails to prevail on such claim and if the court finds that the claimant has acted in bad faith.

DEFINITIONS

SEC. 12. For the purposes of this Act:

(1) The term "antitrust laws" shall have the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)), except that such term shall include section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section 5 relates to unfair methods of competition.

(2) The term "Attorney General" means the Attorney General of the United States.

(3) The term "contract" shall include any ancillary understanding, written or otherwise.

(4) The term "person" shall have the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)).

(5) The term "research and development project" means a project involving basic research, applied research, exploratory development, technology development, or demonstration development, but does not include

the manufacturing or marketing of products developed for commercial use. For purposes of this paragraph—

(A) the term "basic research" means systematic study having the objective of gaining fuller knowledge or understanding of the fundamental aspects of phenomena and of observable facts, without attempting to discover specific applications or processes,

(B) the term "applied research" means systematic study having the objective of gaining knowledge or understanding necessary for determining the means by which a recognized and specific need may be met,

(C) the term "exploratory development" means the conduct of activities designed or intended to lead to a practical utilization of research results for the development of a particular application or product,

(D) the term "technology development" means activities designed to provide a transition from research and exploratory development to engineering systems development to solve a particularly defined technical problem in order to achieve proof of principle or to show technical feasibility, and

(E) the term "demonstration development" means engineering development activities designed to achieve standards of performance, reliability, and process function to identify solutions to meet functional or economic requirements or to otherwise prove concept feasibility, including the design, construction, and testing of prototype units, but not including the development or preparation of any manufacturing design of a product that may be offered for sale.

(6) The term "State" shall have the meaning given it in section 4G(2) of the Clayton Act (15 U.S.C. 15g(2)).

APPLICATION OF ACT

SEC. 13. This Act shall apply with respect to research and development projects carried out under contracts in effect on or after the date of the enactment of this Act.

SEVERABILITY

SEC. 14. (a) Except as provided in subsection (b), if any provision of this Act, or the application of such provision to any person or circumstance, is held invalid, the remainder of this Act and the application of such provision to other persons or circumstances shall not be affected thereby.

(b) If any provision of section 3, 4, 5, 6, 7, or 8, or the application of such provision to any person or circumstance, is held invalid, then this entire Act shall be invalid.

2. PURPOSE OF THE BILL, AS AMENDED

The purpose of the bill, as amended, is to modify the operation of Federal antitrust laws and similar State laws with respect to conducting research and development activities jointly and thereby encourage commercial entities to enter into and secure the benefits of such activities in order to increase industrial innovation, productivity and the economic competitiveness of the United States.

3. COMMITTEE ACTIONS

H.R. 4043 was introduced on September 30, 1983, by Congressman Fuqua and 11 other Members of Congress. The bill, as introduced, represents a consolidation of two earlier bills, H.R. 1952 and H.R. 3393. H.R. 1952 was introduced by Congressmen Synar, Gephardt, Wyden and Zschau and H.R. 3393 was introduced by Congressman Sensenbrenner and Congresswoman Lloyd. The original sponsors and co-sponsors of H.R. 1952 and H.R. 3393 are all co-sponsors of H.R. 4043. All three of these bills referred jointly to the Committee on the Judiciary and the Committee on Science and Technology.

On June 29 and 30, 1983, the Subcommittees on Science, Research and Technology and Investigations and Oversight held joint hearings on the subject of Japanese Technological Advances and Possible U.S. Responses Using Research Joint Ventures. These hearings were held to address the general topic area of research and development joint ventures as well as legislative remedies that might be appropriate to further encourage the formation of these ventures. The subject matter and the testimony obtained from the witnesses related closely with the provisions of the bills under consideration by the Committee. In addition, the Subcommittee on Science, Research and Technology held a legislative hearing on H.R. 1952 and H.R. 3393 on July 12, 1983.

The above three days of hearings involved 24 witnesses representing the Administration, the academic community and the private sector including large and small business and representatives from two on-going research joint ventures.

On October 4, October 6 and October 26, the Subcommittee on Science, Research and Technology held markup sessions on H.R. 4043 and on October 26, 1983, a quorum being present, ordered H.R. 4043 favorably reported by voice vote to the Full Committee with amendments.

On November 2 and November 3, 1983, the Committee on Science and Technology held markup sessions on H.R. 4043 and on November 3, 1983, a quorum being present, adopted H.R. 4043, as amended, by a recorded vote of 41 yeas to 0 nays and, unanimous voice vote, ordered the amended bill favorably reported to the House.

4. BACKGROUND AND NEED FOR LEGISLATION

A number of indicators strongly suggest that the position of world technology leadership once firmly held by the United States is declining. The United States, only a decade ago, with only five percent of the world's population was generating about 75 percent of the world's technology. Now, the U.S. share has declined to about 50 percent and in another ten years, without fundamental changes in our Nation's technological policy, such as those contemplated by this Committee amendment, the past trend would suggest that it may be down to only 30 percent.

This decline in the United States share in world-wide technology does not result from our generating less technology, but from the fact that the rest of the world is generating more and at an ever increasing rate. One specific measure of this trend is seen in the rising number of patents issued to foreign countries. In 1982, for example, foreign patents amounted to 40 percent of the 65 thousand patents issued by the U.S. Patent Office while in the 1950's foreign patents amounted to only 20 percent.

Our overseas competitors, such as Japan, France, and West Germany, appear to have learned to capitalize on scientific research more effectively than the United States has. A strong economic position held by some countries has grown in the past not from fundamental scientific breakthroughs, but rather from an aggressive and very effective combination of government and industry cooperation, coordination and planning.

Of major concern is the decline in its world market share the United States is experiencing with regard to international competition in the

high-technology fields of computers, semiconductors, telecommunications, robotics and aerospace. For example, the U.S. share of the world high-technology market has declined by 20 percent in recent years, while Japan's share has increased by 25 percent.

With specific regard to the case of Japan, some hold the view that the Japanese technological success is attributable to a government-endorsed policy of industry "targeting" by the Ministry of International Trade and Industry (MITI) and other Japanese agencies. This targeting may take the form of low-interest loans to companies within favored industries, tax breaks such as rapid depreciation and favorable government intervention including formal exemption from antitrust laws.

Many policy experts have claimed that the effect of these policies has been to permit favored industries to develop a mature market position with associated well-developed technological "know-how". This combination permits these favored industries to compete exceptionally well in world markets, thereby strengthening their economic position.

Originally, many distinguished scientific and industry panels had recommended the need for some relaxation of current antitrust laws to encourage the formation of R&D joint ventures. This barrier was identified in several studies as one of the principal problems inhibiting the ability of our Nation to maintain its international competitiveness. For example, the prestigious Business-Higher Education Forum has stressed in a recent study the strong need to enhance our private industry's ability to compete with foreign ventures in developing new technologies.

As another example, the National Research Council in a recent report stated that,

While U.S. antitrust policy has begun taking international competition into account, its implementation still fails to give sufficient weight to international trade considerations. The manner in which antitrust statutes are interpreted and applied is charged with interfering in international competitiveness. For example, firms have difficulty retaining the benefits of research that are the product of multifirm collaboration, prospective "Safe Harbor" rulings are not readily available, and there is a general uncertainty regarding what corporate actions may elicit legal actions on the basis of antitrust legislation.

Dr. Bruce Merrifield, Assistant Secretary of Commerce, described, in his testimony on June 30, 1983, how the current United States antitrust laws have placed our Nation in a position of disadvantage relative to other countries,

Of greater significance to us currently is that Japanese antitrust law did not prohibit firms from conducting collaborative research and development in MITI targeted areas such as computers, microelectronics, electronic instruments, lasers, optical communication, robots and aerospace. Earlier this year Mr. Kuzuhero Fuchi, Director of Japan's Institute for New Generation Computer Technology (NGCT), announced a ten-year collaborative joint research and development venture with industry to create a so-called "Fifth Gen-

eration" computer. With this program the Japanese hope to leapfrog the U.S. computer industry.

Similarly, French antitrust law did not deter French firms from conducting massive joint research and development projects in such areas as aerospace, telecommunications, microelectronics, energy, and conservation equipment. West German firms also have not been inhibited by antitrust restrictions in conducting joint research and development in computers, microelectronics, and electronic office equipment.

Further, the European Economic Community has exempted several collaborative research agreements of individual member countries from the antitrust restrictions of Article 85 of its Treaty. For example, the European Consortium Airbus Industrie led by France and West Germany has been able to conduct joint design, testing, and manufacturing, which assisted them in capturing roughly a quarter of the jet aircraft market in 1981. Prior to that, joint research and development had been authorized in such areas as nuclear oxide fuels and electronic components.

The encouragement and fostering of joint research and development ventures are needed responses to the problem of declining U.S. productivity and international competitiveness. According to the testimony received during the Committee hearings, this legislation will provide for a significant increase in the efficiency associated with firms doing similar research and development and will also provide for more effective use of scarce technically trained personnel in the United States.

Based on hearings held by the Committee, several industry witnesses stated positively that they needed a clearly defined area in which a R&D venture could be operated safely within the antitrust laws. This need was expressly emphasized by Mr. Paul Spillane, representing the American Electronics Association, in his testimony on July 12, 1983,

However, discouraging any potential joint venture participants from contemplating similar productive efforts is the shadow case by our anti-trust laws. It is a shadow made darker by ambiguity and uncertainty. No one has yet suggested that joint R&D ventures are inherently unlawful. Nor, to my knowledge, has any joint research venture been successfully prosecuted for violating the antitrust statutes. . . . The impediment, therefore, to the formation of joint research ventures is not so much in what the law says as in what is left cloudy—left to the businessperson's imagination. Legislation which dispels the clouds; which protects joint research participants from the threat of treble damages and from the threat of endless, costly litigation will permit the businessperson to make his calculations free of the timidity now induced by antitrust considerations.

A major concern for the future in the United States exists in industries where capital intensive, high-risk technology developments (such as advanced, high-speed computers) will require huge commitments of funds and skilled workforce resources. In these areas, even

the largest United States companies will have to strain to meet the challenge raised by the well-coordinated Japanese plan.

This need on the part of the United States high-technology industry was stressed by Mr. Ronald Myrick, representing the Semiconductor Industry Association, in his testimony on July 12, 1983,

The threat to American technological leadership from foreign targeting practices is further compounded by the escalating costs of research in advanced microelectronics. The United States can no longer afford the duplication of effort and waste of resources that result when many companies attempt individually to advance the frontiers of research in this vital area. In 1982, U.S. semiconductor companies spent an impressive 14 percent of their sales revenues on capital investments and 9.8 percent on research and development, compared to 7 percent and 3 percent for U.S. industry as a whole. Yet, we are still being outspent by our foreign competition in Japan where semiconductor companies, supported by government subsidies and other incentives, are spending as much as 20 percent on capital and 15 percent on research and development. In short, maintaining U.S. technological leadership requires that we remove any unnecessary obstacles to cooperative research ventures and actively seek to promote such activity.

In addition to research and development being very expensive, the results are often highly uncertain. It is claimed that too often industry tends to focus on the short-range payout rather than looking sufficiently well at long-range strategic needs. Also, some industries composed of small firms do very little research and development (R&D), and therefore, are vulnerable to the effects of technological developments coming in from overseas.

This point was made clear by Mr. Peter McCloskey of the Electronic Industries Association in our hearing on July 12, 1983,

. . . too much of the industrial research performed focuses only on shorter-term applied research driven by industry's need for immediate return on investment. By pooling resources, companies can afford longer-term research—the fruits of which will be employed to assure our industrial competitiveness worldwide. Certainly, one would also expect as a long-term benefit of this legislation a real increase in the productivity growth rate, a lowering of the inflation and unemployment rates, and a stimulated economy.

These problems were clearly pointed out in a Domestic Policy Review on Industrial Innovation conducted by the Carter Administration. In response to this problem, the Justice Department issued anti-trust guidelines in 1980 on the formation of joint R&D ventures.

In addition, a business review procedure is now available at the Department of Justice for any firms contemplating joint R&D ventures. However, the review procedure does not adequately address the problem, as it provides only a statement of present enforcement intentions, and it does not preclude future action that could be retroactive. Although the Justice Department's guidelines are helpful, they are not sufficiently specific and they do not have the force of law. This could be

one explanation for the paucity of proposals for research joint ventures submitted to the Justice Department for review. In view of the very large commitment of resources that could be involved in a R&D venture, it is especially important to provide clarity with respect to the application of our antitrust laws.

The Justice Department points out that no research joint venture proposal has been opposed during the past few years. However, it is impossible to determine how many such ventures that could have had very favorable effects on business and the economy were abandoned or terminated in the very early stages due to uncertainties in the interpretation of our Nation's antitrust laws.

Although R&D joint ventures are not inherently unlawful, testimony obtained by your Committee indicated that two main fears currently exist in industry with respect to forming such ventures:

- (1) the fear that the mere fact of forming such ventures by industry competitors may be illegal, and
- (2) the lure of treble damages for enterprising private attorneys to bring unjustified suits.

For example, Mr. Robert M. Price, President and Chief Operating Officer of Control Data Corporation, testified on July 12, 1983, in connection with his experience in the formation of the Microelectronics and Computer Technology Corporation (MCC) that,

Our own experience with the formation of MCC underscores the urgent need for Congress to act to clear away the uncertainties in the interpretation and application of antitrust laws as they relate to R&D joint ventures. The fear of inadvertently violating U.S. antitrust laws and the threat of treble damages are significant deterrents to undertaking collaborative R&D.

Business executives receive legal advice fraught with uncertainty—where the ultimate legality or illegality of their actions, they are told, can only be conclusively determined by litigation—a complex and expensive and totally non-productive exercise.

Some have said that our success in launching MCC would suggest that clarification of U.S. antitrust laws is unnecessary. I disagree. MCC is, to be sure, completely lawful. But the formation of MCC was neither typical nor easy.

Despite obvious resource shortages in the face of increased demand, and the urgency of the world competitive environment, it took over 18 months for MCC to proceed from an idea to a corporate shell. Even now, nearly two years later, MCC has yet to engage in any substantive research activity.

During that period, both Bill Norris, Control Data's Chairman, and I devoted countless hours trying to overcome the scepticism and reticence of executives less familiar with a cooperative approach to problems. And a subject they repeatedly raised was the so-called "barrier" of U.S. antitrust laws—a conviction by many that irrespective of MCC's legality, such cooperation was inevitably an invitation to become a defendant in at least one horrendously expensive and time consuming lawsuit.

Although joint research and development ventures are not inherently in violation of antitrust laws, it is not clear under present case law as to what joint R&D activities would be expressly deemed to be lawful. Moreover, witnesses clearly identified that the fear of inadvertently violating antitrust laws entered a "chilling effect" on the formation of such joint activities. In fact, there is even a fear that merely meeting to discuss a R&D joint venture might subject such venture to antitrust prosecution.

The second major problem identified by witnesses was the fear of long and costly litigation in the case of a successful venture brought to trial by a plaintiff inspired by the potential award of treble damages. The risk of these cases, even if successfully defended, provides a strong deterrent particularly for ventures involving small business firms with limited resources.

This provision for the award of treble damages is a unique feature of the United States antitrust laws. Section 4 of the Clayton Act provides that anyone injured by an antitrust violation and possessing adequate standing may recover damages, which are automatically trebled. The mandatory trebling provision is speculated to provide both a deterrent against antitrust law violation and an incentive for private parties undertaking legal actions to challenge anticompetitive conduct, thus supplementing the enforcement resources of the government agencies.

Although the treble damage provision was seen to have merit, particularly in cases of clear violation of antitrust law, such as price-fixing or bid-rigging by competitors, witnesses questioned whether it is appropriate to punish business to the same degree and in the same fashion in cases of cooperative research ventures.

This is particularly true in view of the fact that joint research efforts may produce important advances in technology, lower costs, higher employment, and increased economic growth. Even more significant is the fact that these ventures will be strictly involved in research and development activities, and not the commercial types of market place activities that have generally been the cause of antitrust action in the past. These ventures can also enable smaller businesses to stay competitive in new, high technology markets and they may stimulate productivity growth that will enable the United States to better compete in world trade.

5. EXPLANATION OF THE BILL, AS AMENDED

A. SUMMARY OF THE KEY PROVISIONS OF THE COMMITTEE AMENDMENT

H.R. 4043 is a bill intended to modify the operation of the antitrust laws to encourage the formation of research and development joint ventures in order to increase the effectiveness of technology development and to improve the economic competitiveness of the United States. The Committee amendment is a balanced and coordinated package of provisions that provides for antitrust law immunity (including both civil and criminal) for joint R&D ventures that comply with the requirements of this Act. The key provisions of the bill, as amended, are:

1. Specifies that activities must be limited to R&D: Activities of the R&D joint venture must be strictly limited to research and development in order to fall within the scope of this Act. The manufacturing, marketing or the development of products that could be offered for sale is expressly excluded from activities that may be engaged in by the R&D venture.

2. Modifies the Application of Federal and Similar State antitrust laws for R&D ventures that either:

A. Choose to be formed and operated in compliance with defined standards as specified in section 3 (Safe Harbor). Immunity from liability under antitrust laws exists only as long as compliance with the standards is maintained. The standards include:

a. Notice to the Attorney General stating who the participants are and the general nature of the projects.

b. All venture participants in a project are entitled to use on an equitable basis the results of such project and are entitled to equivalent licenses to technology developed by the project.

c. No restrictions can be made as to participants' own use of results, their own R&D activities, or their other activities not related to the venture.

d. Participants cannot be required to provide results of their own previous R&D activities.

e. Venture size must not preclude the existence of at least two other firms or groups of firms of equal or greater financial resources than the venture who are capable of being engaged in similar research and development projects. If the Attorney General determines that the venture size limit is exceeded, in lieu of this specified limit, the venture may agree to make licenses to venture results available on fair and reasonable terms as determined by the Attorney General in order to maintain its immunity.

Or

B. Choose to provide to the Attorney General a full and detailed disclosure of the venture's participants and intended activities in addition to compliance with certain of the Safe Harbor standards (Negative Clearance). Immunity from liability (except for injunctive relief) under the antitrust laws would take effect 90 days after such disclosure unless action is taken by the Attorney General. Publication is to be made of a Federal Register notice concerning the formation of the venture. If a permanent injunction is issued, the immunity would terminate. Licenses to technology developed by the venture may be ordered by the court to a successful plaintiff in lieu of an injunction.

3. Specifies award of actual damages for any joint R&D venture found in violation of antitrust laws: A provision limiting antitrust awards to actual damages is provided to further encourage the formation of R&D joint ventures and to shelter any R&D joint venture from the potential of treble damage awards. Interest is awarded from the date of service of the claim to help minimize unnecessarily long, drawn-out litigation.

4. Provides for award of attorney's fees to successful defendant: Provision is made for award of attorney's fees to a successful defend-

ant if an antitrust action is brought against him in connection with an R&D venture, and if the court finds that the claimant has acted in bad faith.

5. Requires that the "rule of reason" be used in antitrust cases involving research and development joint ventures: This provision assures that cases involving R&D joint ventures will not be decided on a "per se" rule by the court, but that a full evaluation of the procompetitive aspects of the case will be made.

6. Provides for investigation by the Attorney General of any venture that submits notification or disclosure to determine compliance with this Act: The amended bill gives authority to conduct this investigation and it specifies that the Attorney General must notify the venture of adverse findings and specify corrective action needed to satisfy compliance.

7. Includes a "burden of proof" requirement: The amended bill requires that a plaintiff show both that a cause of action exists under the antitrust laws and that the applicable provisions of the bill have not been complied with in order to prevail in an antitrust action.

8. Shelters attempts to make R&D contracts even if not successful.

9. Includes a "severability" clause that would cause the entire act to be invalid if any provision in one of the sections dealing with antitrust exemption (sections 3, 4, 5, 6, 7, or 8) is held to be invalid.

B. DETAILED EXPLANATION OF THE COMMITTEE AMENDMENT

The Committee amendment is a balanced and coordinated package of provisions that are intended to encourage the formation of R&D joint ventures by modifying the application of the antitrust laws to these ventures. The Committee amendment provides three essential elements to achieve this goal. These elements include: (1) the granting of immunity to a particular venture if it meets the requirements of either of the two approaches for obtaining immunity, (2) a new rule of damages with regard to R&D joint ventures, and (3) a new rule for the award of attorney's fees with regard to R&D joint ventures. In order to obtain any of the benefits provided, the venture must strictly confine its activities to research and development.

The Committee intends to make it very clear that failure to comply with any of the provisions of the Committee amendment in no way intends to suggest failure to comply with any of the antitrust laws, nor is it necessary for a R&D joint venture to always comply with this Act in order to be in compliance with the antitrust laws.

1. Research and development definition

In order to obtain any of the benefits under the Committee amendment, the activities of the venture must be limited to research and development (R&D). These activities are specifically defined in detail in section 12(5). The intent of this definition is to permit research and development activities to proceed down the "innovation pipeline" concept, discussed by Dr. Bruce Merrifield in his testimony on June 30, 1983, up to but not including the development or preparation of any manufacturing design of a product that may be offered for sale. It is intended that the venture be permitted to evaluate both technical and economic performance of a development to verify potential future

commercial viability, but the final commercialization step is to be done by the individual firms in the venture, not the venture itself.

This approach is intended to permit the benefits of the aggregation of needed resources, both personnel and financial, for R&D efforts up to and including the stage of demonstration development, while also preserving the benefits of competition in the subsequent stage of manufacturing and marketing of products. The definition expressly excludes from the term "R&D" the manufacturing or marketing of products developed for commercial use. However, the Committee believes that this term should extend to permit a venture to engage in the operation of a pilot plant to prove a process technology, for example, and to be able to sell the product (or any unused feedstock) from the pilot plant recognizing that these materials are only incidental to such process technology that is under development.

The Committee believes that as part of the venture's R&D activities that the venture may:

- take any legal form
- establish facilities necessary to carry out R&D activities
- collect and exchange technical information relating to the venture's activities
- conduct research on a protected and proprietary basis
- prosecute applications for patents with respect to venture results
- grant licenses and collect royalties

In addition, the participants to any venture may:

- assign employees to the venture
- provide own R&D results
- conduct research for the venture

2. Application of antitrust laws

Two alternatives to obtain immunity from liability under Federal and similar State antitrust laws are included to accommodate the wide range of R&D ventures that may be formed. The first of these, known herein as the Safe Harbor, requires that the venture be established and operated in accordance with defined standards (sections 3 and 4).

The second avenue available to obtain immunity from liability (except for injunctive relief) under Federal and State antitrust laws involves a more detailed disclosure of the venture's activities than required under the safe harbor option and compliance with certain of the safe harbor standards. This second approach, referred to herein as Negative Clearance, was not contained in either of the two earlier bills referred to this Committee, H.R. 1952 or H.R. 3393. The negative clearance alternative was made part of the consolidated bill, H.R. 4043, to provide an alternative path for immunity for those ventures that for one reason or another could not or elected not to comply with the contract standards required by the safe harbor option.

I. The defined standards of section 3 and 4 (Safe Harbor) are.—

A. Information discovered or developed in any venture project must be reported to the remaining participants in the venture who are not involved with that project.

B. All venture participants in a project are entitled to use on a equitable basis the results of such project.

C. All venture participants in a project are entitled to irrevocable, nonexclusive, equivalent licenses to technology developed by the project.

D. The venture may not impose on any participant:

- (i) any restriction on the participants own R&D activity;
- (ii) any obligation to make available results of any previous R&D;
- (iii) any restriction on how a participant uses any of the results of the venture except that the results cannot be licensed to non-participants in the project without the agreement of the other participants in the project; or

- (iv) any restriction with respect to any participant's manufacturing or marketing activities of any product or service either unrelated to or resulting from any of the venture's R&D results.

E. The venture must notify the Attorney General as to the identity of the participants and the general description of the R&D project (section 4). This notice is intended to advise the Attorney General and the public that a venture has been formed. It does not require the full disclosure of the details of a proposed venture as is required in order to comply with the negative clearance option of section 5. In addition, the Attorney General is required after such notification to publish a Federal Register notice to identify the parties and the general nature of each research and development project.

F. The venture size must be such as to permit or to accommodate the existence of at least two other independent firms (or groups of firms) of equal or greater financial resources capable of being engaged in similar and competing research and development projects. The intent of this limit is to promote and encourage competition in any line of commerce to which any research and development project relates by insuring that the venture does not represent more than one-third of the existing or potential world-wide research capability in any such line of commerce. The Committee believes that the term "line of commerce" should be interpreted to refer to such lines as memory chip development, robotics technology, or ceramic engine development (Sec. 3(c)(2)).

The term "financial resources" is used to indicate a measure of a firm's financial capability to conduct research and development activities in competition with those being done by the venture. This term is not intended to represent an absolute measure of potential research capability which might otherwise include such factors as current or planned expenditures for research and development or the extent of facilities or personnel available for conducting research and development, but instead should be interpreted to provide a general measure of capability that can be quantified from information that can be made available to the public and the courts. Moreover, the term is intended to refer to the aggregate net income of the firms participating in the venture including the net income of parent companies and any affiliated companies that are controlled by the parent company reported for the year prior to the year in which the venture is formed, and other measures of financial resources used by financial institutions.

The term "controlled" as used above and in section 3(c)(2) is intended to mean having a majority ownership position or the ability to control the management of an entity.

H.R. 4043, as introduced, contained a provision in the safe harbor alternative for immunity from liability under antitrust laws that required ventures to license to non-participants at reasonable royalty rates the developments of the venture if they chose the safe harbor path to immunity. This provision was amended in Subcommittee markup to require licensing to small business firms and to other non-participants based on a finding by the Attorney General after a hearing on the record that failure to issue such a license would significantly impair competition in the line of commerce to which the license involved relates.

The intent of the amendment offered in Subcommittee was to provide for enhanced transfer of technology developed by ventures to small business and others. Since the original bill did not contain a limit on venture size, this licensing provision also addressed the concern raised by Administration witnesses that a venture representing too large a percent of a research area would put the remaining firms at an unfair disadvantage. The licensing provision was included to eliminate this disadvantage by requiring that licenses to any technology developed be granted to outsiders if the venture chose this path to immunity.

Very strong negative comments were received from the Administration, intellectual property groups, and the National Association of Manufacturers with respect to the licensing provision. It was alleged that such a provision would provide a significant disincentive for joint ventures to use the Safe Harbor alternative except perhaps for certain high-technology industries. It was stated that the concept of requiring licensing was in basic conflict with the fundamental notion of exclusivity and the well-developed policy of the United States intellectual property laws. In addition, it was identified that this provision could be viewed as being in conflict with the long-term policy of the United States in International patent law negotiations such as The Law of the Sea Treaty and the Paris Convention for the Protection of International Intellectual Property Rights. Based on a careful re-assessment of this issue, the Committee deleted the Subcommittee-adopted licensing provision in the Committee amendment reported by the Committee.

A venture size limit was included in the bill, as amended, as a balancing provision when the Subcommittee licensing provision was deleted. The rationale associated with the venture size limit is to provide a clearly defined standard to assure that no venture got so large as to represent an overwhelmingly dominant percent of world research capability in any area of research. A one-third limit was selected by the Committee as reasonable to avoid creating an unfair advantage and to recognize that the greater the number of actual or potential competitors in an industry, the more likely that a joint research project will not unreasonably restrain competition. Also, the smaller the venture, the easier it is to show compliance with the limit as the Committee believes it should be.

Ventures that exceed this size limit may be quite procompetitive depending on the nature of the research involved. In recognition of this and to provide additional flexibility to permit the formation of certain ventures, the Committee provided an alternative to this size limit. The venture may agree, in lieu of compliance with the size limit to license

venture developments to non-participants on terms as determined by the Attorney General (Sec. 6(b)).

II. *Section 5, full disclosure to the Attorney General (negative clearance).*—The Committee adopted two complimentary approaches for obtaining freedom from liability under antitrust laws. The second approach (Negative Clearance) provides a second alternative to obtain an exemption from liability (except for injunctive relief) under Federal and similar State antitrust laws. This second approach was included as part of the original text of H.R. 4043 to provide an alternative for ventures that did not elect to utilize the safe harbor option. As presented in H.R. 4043, the negative clearance alternative requires that the evaluation of the venture be made by the Attorney General based on a detailed disclosure of the venture's plans. Under negative clearance the exemption from liability does not become effective until 90 days after the venture files its disclosure.

The negative clearance alternative is considered to be more attractive to ventures that for one reason or another found the provisions of the safe harbor did not fit the needs of their specific industry.

The Committee believes that negative clearance provides the Attorney General with the opportunity to take appropriate action to assure that competition is maintained and avoids the necessity of formal affirmative response from the Attorney General if not appropriate.

In order to preserve the character of ventures given immunity from antitrust liability, a number of standards from the safe harbor option were included as requirements in the negative clearance, section 5. The standards included are:

A. Information discovered or developed in any venture project must be reported to the remaining participants in the venture who are not involved with that project.

B. All venture participants in a project are entitled to use on an equitable basis the results of such project.

C. The venture may not impose on any participant:

(i) any restriction on the participants own R&D activity;
(ii) any obligation to make available results of any previous R&D;

(iii) any restriction on how a participant uses any of the results of the venture except that the results cannot be licensed to non-participants in the project without the agreement of the other participants in the project; or

(iv) any restriction with respect to any participant's manufacturing or marketing activities of any product or service either unrelated to or resulting from any of the venture's R&D results.

Under the negative clearance alternative, as with the safe harbor, the Attorney General is required to publish a Federal Register notice to identify the parties to the contract and to describe in general terms each research and development project to be carried out. In addition, the notice shall specify the extent to which information and documents submitted in the disclosure are available to the public. This notice is to be published on initial disclosure and on any subsequent disclosure on amending of the venture's contract.

For the negative clearance alternative, the venture is provided immunity from liability under antitrust laws except for injunctive relief.

This injunctive relief may be requested by either the Attorney General or a private party. If a permanent injunction is granted, then the immunity afforded under this section does not apply to conduct that occurs after the temporary or permanent injunction is granted. If any injunction is subsequently set aside on appeal, then the immunity status would be restored. The term "permanent injunctive relief" as used in the bill is intended to mean the final status after all appeal steps have been completed.

In lieu of injunctive relief, the Committee amendment includes a section, section 5(e)(2), which provides that a plaintiff may seek a court order requiring the issuance of a license to the technology developed by the R&D project with respect to which the injunction would have been obtained. This remedy has been used in some larger antitrust cases, and it was felt by the Committee that it was appropriate to specify it in the amendment as an available remedy.

Information and documents submitted under the negative clearance option may be withheld from public disclosure if such a request is made by the venture and if the Attorney General determines that there is good cause to withhold such information or document from the public. This provision was included to address the concern that information of the type that would be considered proprietary by the participants in a venture would be made public if they chose the negative clearance option.

3. Investigation by the Attorney General

The Committee amendment (section 6) authorizes the Attorney General to investigate ventures that submit information according to either the safe harbor or the negative clearance option for purposes of determining whether the information submitted is accurate and whether the actual activities of the venture comply with the terms of their contract and are consistent with the descriptions of activities provided in the required notice or disclosure to the Attorney General.

With respect to the safe harbor option, the Attorney General is required to notify all parties to a venture whenever such an investigation is in progress. If, after such investigation, it is subsequently found that the venture does not comply with the provisions of section 3, then the Attorney General must notify the venture as to the findings, the reasons in support of the findings, and identify what actions would be needed to bring the venture into compliance, if they chose to do so.

Information obtained by the Attorney General in the course of this investigation is exempt from public disclosure requirements and no determination made by the Attorney General is admissible as evidence in an antitrust action.

4. Attempts to form joint R&D ventures

The Committee amendment provides that any attempts to make joint R&D ventures are exempt from antitrust laws (section 7). This provision is intended to shelter actions involved in forming a joint R&D venture up to but not including the action of entering into such an agreement. The purpose of this section is to eliminate the concern on the part of prospective ventures that even their holding discussions or negotiations on a potential R&D joint venture could be viewed as activity in violation of the antitrust laws.

5. Claims under antitrust laws

Section 8(a) of the bill, as amended, is intended to clarify that the mere fact that a venture does not comply with the provisions of either the safe harbor or the negative clearance option shall not be deemed as a violation of any of the antitrust laws. The intent of this subsection is to assure that the provisions identified in the Committee amendment are not to be interpreted as requirements for compliance with the antitrust laws.

Section 8(b) requires that the plaintiff in order to prevail in an antitrust action must show both (1) failure on the part of the defendant to satisfy the provisions of section 3, and (2) a cause of action under antitrust laws. This provision is intended to further clarify that failure to satisfy provisions of section 3 does not of itself constitute violation of antitrust law.

6. Modification of the "per se" rule

Section 9 provides that in any antitrust action the making or performing a contract to carry out a R&D project jointly shall not be deemed to be illegal "per se". The earliest antitrust rulings by the courts differentiated between business conduct that was so likely to injure competition that it could be deemed illegal without inquiry into competitive effect in every specific case (the "per se" violation), and conduct that had sufficient procompetitive potential that it could be condemned only after consideration of its overall purposes and effects in the particular circumstances presented (the "rule of reason" analysis). Thus, "per se" violations involve agreements or practices the nature or effect of which is so anticompetitive that they are deemed unreasonable and therefore illegal without elaborate study in each individual case as to the precise harm they have caused or the business justification for their use. Examples of "per se" violations are price fixing or bid rigging among competitors. Section 9 requires that the "rule of reason" analysis be used for R&D joint venture cases.

7. Modification of damages

Section 10 provides a limit of actual damages as a recovery available for antitrust violations that are found to occur as a result of performing a joint R&D project. This provision is intended to provide a "safety net" for actual or potential R&D joint ventures and thereby eliminate the fear that they may inadvertently violate antitrust law and become liable for the treble damages required by the Clayton Act.

This provision would also shelter R&D ventures that did not comply with the safe harbor provisions and did not elect to disclose the details required by the negative clearance option.

8. Attorney's fees

Section 11 requires the court to award to a successful defendant in an antitrust claim involving a joint R&D venture a reasonable attorney's fee if the court finds that the claimant has acted in bad faith. This provision is intended to further encourage the formation of R&D joint ventures by discouraging frivolous suits. H.R. 4043, as introduced, did not require a finding of bad faith but mandated the award of attorney's fees to a successful defendant. However, in keeping with the spirit of American jurisprudence practice, and recognizing that

the requirement for an unsuccessful plaintiff to pay the defendant's attorney's fees could put an excessive burden of risk on the part of a small business firm who felt in good faith that it was injured by a venture, the Committee adopted the provision in section 11 of the Committee amendment that requires the court to award attorney's fees to a successful defendant if the court finds that the claimant has acted in bad faith. The purpose of this provision is to balance the rules regarding attorney's fees that are presently contained in the antitrust laws.

9. Severability

Subsection 14(a) provides that, except as provided in subsection (b), if any provision of the Act is held invalid, the remainder of the Act shall not be affected thereby.

Subsection 14(b) provides that if any provision in any of the sections dealing with the exemptions provided to antitrust law is held invalid (sections 3, 4, 5, 6, 7, or 8), then the entire Act shall be held invalid.

A severability provision was not contained in H.R. 4043, as introduced, but it was generally agreed by the Committee that a severability approach other than that which would otherwise be used by the courts was needed in the case of H.R. 4043. The present approach was adopted vs a severability provision that would maintain the "rule of reason" provision, the actual damages limit, and the attorney's fees provision on the basis that the entire bill is seen as a coordinated package that needs to be treated as a unit rather than in a fragmented way.

The amended H.R. 4043 was designed to encourage R&D joint ventures by use of an inter-related combination of provisions to establish a basis for activity that would eliminate the fear of antitrust law violation on the part of prospective venturers and in addition, reduce the potential risk of a R&D joint venture in the event that it may be subsequently found that as antitrust law violation had occurred.

Because these provisions were seen to be very closely dependent on each other to maintain the overall intent of the Act, and because of the realization that these provisions were modifying the operation of the United States antitrust laws that have been in operation since the 1890's, the Committee adopted the severability concept presented in section 14. This clause will assure that any changes in the operation of antitrust law would be as a result of the functioning of the Act as a sum of its parts and not as a result of a policy that would be the consequence of part of the Act being severed by the courts.

6. SECTIONAL ANALYSIS

SECTION 1.—SHORT TITLE

This Act may be cited as the "Research and Development Joint Venture Act of 1983"

SECTION 2.—FINDINGS AND PURPOSE

(a) Findings

(1) Many firms are unable to undertake the levels of research and development necessary for the United States to remain competitive in global markets because of the capital intensive nature of research and

development and the shortage of trained scientific and engineering personnel.

(2) The uncertainty of interpretation and enforcement of Federal and State antitrust laws with the associated concern about long and costly litigation discourages joint research and development activities, even when joint activity would foster innovation and enhance competition.

(3) A need exists to modify the operation of Federal and State antitrust laws in order to encourage commercial entities to carry out productive joint research and development projects.

(b) Purpose

The purpose of this bill, as amended, is to modify the operation of Federal and similar State antitrust laws with respect to conducting research and development activities jointly and thereby encourage commercial entities to secure the benefits of such activities in order to increase industrial innovation, productivity, and the economic competitiveness of the United States.

SECTION 3.—APPLICATION OF ANTITRUST LAWS

Subsection (a) provides that no person shall be liable under Federal or State antitrust laws for making or performing a contract to carry out a joint R&D venture if:

Notice is given to the Attorney General in accordance with section 4, and

The contract meets the provisions specified in subsections (b) and (c).

Subsection (b) contains the provisions that must be complied with in order to obtain antitrust law immunity under this section. These provisions are:

The parties carry out one or more research and development projects,

Information discovered or developed in a project must be reported to the other members of the venture within a reasonable time,

All parties in a project shall be entitled to use results of the project on an equitable basis,

All parties in a project shall be entitled to equivalent licenses to project developments,

No restrictions can be made on a parties own R&D work,

Parties are not obligated to divulge own previous R&D results,

No restriction can be made on a parties own use of project results, and

No restriction can be made on any participant's manufacturing or marketing activities.

Subsection (c) (1) specifies that the joint venture R&D contract shall not provide for activities other than those needed to carry out a joint R&D project or any activity required to obtain a patent or issue a license.

Subsection (c) (2) limits the size of a venture to effectively no more than one-third of the world-wide capability for conducting research in the area to which any project relates as measured in terms of financial

resources. The language of this subsection uses the concept that at least two other persons or groups of persons of equal or greater financial resources capable of performing similar research and development must exist.

Subsection (c) (3) requires that the parties to the joint R&D contract must submit to the Attorney General information required by section 4.

SECTION 4.—NOTIFICATION OF ATTORNEY GENERAL

Subsection (a) requires that, in order to obtain the protections of subsection 3(a), within 60 days of making a joint R&D contract the venture must submit notice to the Attorney General to include:

- The date the contract is made,
- Identities of the parties to the contract,
- A general description of each project,
- Identities of parties carrying out each project, and
- A statement affirming compliance with section 3.

An additional notice is required if the contract is amended in such a way as to make inaccurate any information in the previous notice.

Subsection (b) requires that within 30 days after any notification the Attorney General publish in the Federal Register the names of the parties in the venture and the general nature of each project.

SECTION 5.—CLEARANCE PROCEDURE

Subsection (a) provides that no person shall be liable under Federal or State antitrust laws (except for injunctive relief) for performing a joint R&D contract if certain specified requirements of section 3 are met and a full disclosure of the venture's intended activities is made to the Attorney General. Such immunity from liability would start 90 days after the venture's initial disclosure.

Subsection (b) defines the information that must be disclosed to the Attorney General either initially or subsequently, if the contract is amended.

Subsection (c) requires that the Attorney General publish in the Federal Register notice of the venture's initial or subsequent disclosure including the names of the parties, the general nature of each R&D project, and the extent to which other information is available to the public.

Subsection (d) requires that the parties provide to the Attorney General requested information relating to the impact of such contract on competition that the Attorney General has required by rules in effect at the time a venture makes its initial disclosure.

Subsection (e) terminates the antitrust law exemption provided by this section for conduct that occurs after a permanent injunction is obtained for such conduct.

This subsection also provides that a claimant may request in lieu of injunctive relief that a license be ordered to be granted by the court for rights acquired as a result of the R&D project with respect to which the injunction would be obtained.

Subsection (f) provides that information provided to the Attorney

General under this section may be withheld from public disclosure if the Attorney General finds in response to a request by the venture that there is good cause to withhold such information.

SECTION 6.—INVESTIGATION BY THE ATTORNEY GENERAL

Subsection (a) provides that the Attorney General may investigate ventures that submit information under either sections 4 or 5 to determine whether such information is accurate and complies with the needed requirements and whether the R&D projects are actually carried out in compliance with the information provided to the Attorney General.

Subsection (b) requires that the Attorney General give notice to a venture whenever an investigation is started and notice of a determination made by the Attorney General that the venture does not comply with section 3. In this event, the notice shall include a statement of the facts in support of such determination and a statement specifying actions that the venture may take to comply with section 3.

This subsection also provides that if a venture does not comply with the size limit of section 3, then, as an alternative, the venture can agree to grant licenses to non-participants on fair and reasonable terms as determined by the Attorney General.

Subsection (c) provides that information obtained by the Attorney General in the course of conducting an investigation under this section is exempt from public disclosure under the Freedom of Information Act.

Subsection (d) provides that no determination made by the Attorney General is admissible as evidence in an antitrust action.

SECTION 7.—ATTEMPTS TO MAKE CONTRACTS

This section provides immunity from liability under Federal and State antitrust laws for attempting to make a contract to form a R&D joint venture.

SECTION 8.—CLAIMS UNDER ANTITRUST LAWS

Subsection (a) provides that the mere fact that a person has not elected to comply with or does not comply with the provisions of section 3 or 5 shall not be deemed as a violation of any of the antitrust laws.

Subsection (b) puts the burden of proof on the plaintiff in an antitrust action to show both (1) that the venture has failed to satisfy the provisions of section 3, and (2) that there is a cause of action against the venture with respect to antitrust laws.

SECTION 9.—PER SE VIOLATION OF ANTITRUST LAWS

This section provides that no activity involved in making or performing a joint venture R&D contract shall be deemed to be illegal per se. Such cases must be decided based on an evaluation of the pro-competitive aspects involved.

SECTION 10.—MODIFICATION OF DAMAGES

This section limits the liability of a R&D venture to actual damages in the event that a venture is found in violation of antitrust law. The liability also includes the cost of suit (including a reasonable attorney's fee) and any interest that may be awarded from the date of service of the claim.

SECTION 11.—ATTORNEY'S FEES

This section provides for the payment of attorney's fees to a successful defendant in a R&D joint venture antitrust action if the court finds that the suit was brought in bad faith.

SECTION 12.—DEFINITIONS

This section provides definitions for certain terms used in the Act. A key definition is the one given for a "research and development project" as this definition specifies the nature of the activity that qualifies a venture to obtain any of the benefits afforded under the Act. The definition specifically excludes activities relating to manufacturing or marketing of products developed for commercial use or the development or preparation of any manufacturing design of a product that may be offered for sale.

SECTION 13.—APPLICATION OF ACT

This section specifies that the Act will apply with respect to R&D projects carried out under contracts in effect on or after the date of enactment.

SECTION 14.—SEVERABILITY

Subsection (a) provides that, except as provided in subsection (b), if any provision of the Act is held invalid, the remainder of the Act shall not be affected thereby.

Subsection (b) provides that if any provision in any of the sections relating to exemption from liability under antitrust laws is held invalid (sections 3, 4, 5, 6, 7, or 8), then the entire Act would be held invalid.

7. COMMITTEE VIEWS

AGREEMENT TO LICENSE

The Committee believes that the inclusion of the licensing provision contained in H.R. 4043, as introduced, would be in conflict with the intended objective of the bill to encourage the formation of research joint ventures, and therefore, acted to delete this provision.

Licensing of technology is seen as a mechanism to potentially enhance competition through technology transfer particularly to small firms and others who were not able to participate in the venture. However, the availability of required licenses to technology developed could have the negative effect of causing firms to avoid their own development in favor of waiting to obtain a license. In addition, the concept of requiring licensing in exchange for immunity is felt to be

in basic conflict with the fundamental goal of adopting a bill which could be used by a variety of business concerns.

8. INFLATION IMPACT

Pursuant to Rule XI, Clause 2(1) (4), of the Rules of the House of Representatives, the Committee estimates that enactment of this bill into law would have no significant inflationary impact on prices and costs in the operation of the national economy.

9. COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Pursuant to Rule XI, Clause 2(1) (3), of the Rules of the House of Representatives, and under the authority of Rule X, Clause 2(b) (1) and Clause 3(f), results and findings of Committee oversight activities regarding research and development joint ventures are incorporated in the recommendations found in the present bill and report.

10. SUMMARY OF GOVERNMENT OPERATIONS COMMITTEE FINDINGS AND RECOMMENDATIONS

No findings and recommendations on oversight activity pursuant to Rule X, Clause 2(b) (2), and Rule XI, Clause 2(1) (3), of the Rules of the House of Representatives have been submitted by the Committee on Government Operations for inclusion in this report.

11. BUDGET ANALYSIS AND PROJECTION

H.R. 4043 provides no new budget authority or tax expenditures. Consequently, the provisions of section 308(a) of the Congressional Budget Act are not applicable.

12. CONGRESSIONAL BUDGET OFFICE ESTIMATE AND COMPARISON

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., November 15, 1983.

Hon. DON FUQUA,
*Chairman, Committee on Science and Technology,
U.S. House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 4043, the Research and Development Joint Venture Act of 1983, as ordered reported by the House Committee on Science and Technology, November 3, 1983.

CBO estimates that enactment of this bill will result in no significant additional costs to the Federal Government.

H.R. 4043 modifies the antitrust laws to encourage the formation of joint ventures for research and development. Participants in such a joint venture must notify the Attorney General about planned research and development activities and about the terms of the agreement governing the venture. The Attorney General shall publish in the Federal Register information regarding the joint venture and may investigate the venture to ensure compliance with the agreement. In addition, under certain circumstances, the Attorney General is authorized to deter-

mine when joint ventures must issue licenses. While the bill would increase the responsibilities of the Department of Justice, the additional work required is not expected to be substantial. Some costs may be incurred for litigation concerning access to licenses, but there is no basis for predicting the likelihood or the amount of such costs.

This bill will not affect the budgets of state and local governments.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

RUDOLPH G. PENNER.

13. ADMINISTRATION POSITION

At hearings held by the Committee, several Administration witnesses, representing the Department of Justice and the Department of Commerce, supported the general need for legislation in the area of antitrust relief for research joint ventures. Their testimony appears in the hearings record. The proposal put forward by the Administration in this area is reflected in H.R. 3878. This proposal includes reducing antitrust damages from treble to single and eliminating the "per se" rule for R&D joint ventures. No provisions are included that would grant immunity from liability as done in H.R. 4043.

14. COMMITTEE RECOMMENDATION

On November 3, 1983, a quorum being present, the Committee adopted H.R. 4043, as amended, by a recorded vote of 41 ayes to 0 nays and, by unanimous voice vote, ordered the amended bill favorably reported.

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